

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO**

## ANTONIO VELAZQUEZ PEREZ

## **Plaintiff**

V.

Civil Action No. 10-1002 (GAG)

## **DEVELOPERS DIVERSIFIED REALTY**

## CORP.; DDR PR VENTURES II LLC

### **Defendants.**

## OPINION AND ORDER

Antonio Velazquez Perez (“Plaintiff”) brings this action against Developers Diversified Realty Corp. and DDR PR Ventures II LLC (“DDR” or “Defendants”), alleging sexual harassment<sup>1</sup> and retaliation in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. §§ 2000e *et seq.* Plaintiff also invokes the supplemental jurisdiction of the court to adjudicate claims under Puerto Rico state laws: Laws Number 100 and 17, P.R. Laws Ann. tit. 29, §§ 146 *et seq.*, §§ 155 *et seq.*, respectively; and Puerto Rico Law 69, P.R. Laws Ann. tit. 29, §§ 1321 *et seq.*, and Law No. 80 of May 30, 1976, as amended (“Law 80”), P.R. Laws Ann., tit. 29, § 185a *et. seq.*

This matter is currently before the court on defendants' motion for summary judgment. (Docket Nos. 58, 59). Plaintiff opposed defendants' motion for summary judgment. (Docket No.

<sup>1</sup> Plaintiff's complaint seems to be severing his sex discrimination and sexual harassment claims. Nevertheless, a reading of the complaint and the opposition to the motion for summary judgment reveal that the basis of plaintiff's sex discrimination claim is the acts that allegedly constituted sexual harassment. Accordingly, the court will examine Plaintiff's sex discrimination claim solely in the form of harassment.

1 **Civil No. 10-1002 (GAG)**

2

3 75). By leave of the court, Defendants filed a reply brief (Docket No. 90) and a motion to strike  
 4 (Docket No. 91) alleging that Plaintiff's opposition was supported by a "sham affidavit" that  
 5 contradicted his prior deposition testimony and should therefore, be stricken from the record.  
 6 Plaintiff sur-replied (Docket No. 112). The court issued an order (Docket No. 131) striking the  
 7 affidavit in question from the record (Docket No. 75-2) and instructing Plaintiff to resubmit an  
 8 opposition to Defendants' motion for summary judgment which did not refer to information  
 9 contained on the stricken affidavit. In compliance with the court's order, Plaintiff resubmitted its  
 10 opposition and the amended responses and objections to Defendants' statement of uncontested facts  
 11 (Docket No. 132). Defendants' replied to Plaintiff's amended responses and objections (Docket No.  
 12 145) and filed a reply memorandum to Plaintiff's opposition (Docket No. 146). Plaintiff filed  
 13 motions requesting leave to file a sur reply (Docket Nos. 150 and 151). The court will not consider  
 14 Defendants' reply, and therefore, will also not consider Plaintiff's surreply. After reviewing the  
 15 pleadings and pertinent law, the court **GRANTS** Defendants' motion for summary judgment.

16 **I. Standard of Review**

17 Summary judgment is appropriate when "the pleadings, depositions, answers to  
 18 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
 19 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter  
 20 of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "An issue is  
 21 genuine if 'it may reasonably be resolved in favor of either party' at trial, and material if it  
 22 'possess[es] the capacity to sway the outcome of the litigation under the applicable law.'" Iverson  
 23 v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006) (alteration in original) (citations omitted). The  
 24 moving party bears the initial burden of demonstrating the lack of evidence to support the non-  
 25 moving party's case. Celotex, 477 U.S. at 325. "The movant must aver an absence of evidence to  
 26 support the nonmoving party's case. The burden then shifts to the nonmovant to establish the  
 27 existence of at least one fact issue which is both genuine and material." Maldonado-Denis v.  
 28 Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994). The nonmoving party must then "set forth  
 specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). If the court finds

1 **Civil No. 10-1002 (GAG)**

3

2 that some genuine factual issue remains, the resolution of which could affect the outcome of the  
3 case, then the court must deny summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S.  
4 242, 248 (1986).

5 When considering a motion for summary judgment, the court must view the evidence in the  
6 light most favorable to the non-moving party (here, the plaintiff) and give that party the benefit of  
7 any and all reasonable inferences. Id. at 255. Moreover, at the summary judgment stage, the court  
8 does not make credibility determinations or weigh the evidence. Id. Summary judgment may be  
9 appropriate, however, if the non-moving party's case rests merely upon "conclusory allegations,  
10 improbable inferences, and unsupported speculation." Forestier Fradera v. Municipality of  
11 Mayaguez, 440 F.3d 17, 21 (1st Cir. 2006) (quoting Benoit v. Technical Mfg. Corp., 331 F.3d 166,  
12 173 (1st Cir. 2003)).

13 **II. Relevant Factual & Procedural Background**

14 Plaintiff filed a complaint (Docket No. 1) against DDR in which he alleges that he was  
15 sexually harassed by his co-worker Rosa Martinez ("Martinez"), regional property accountant and  
16 human resources liaison for Puerto Rico. He also alleges that, after complaining of sexual  
17 harassment, he became a victim of retaliation by Martinez and Rolando Albino ("Albino"), his  
18 supervisor. Defendants filed a motion for summary judgment (Docket No. 59) and a statement of  
19 uncontested material facts in support of motion for summary judgment ("SUMF") (Docket No. 58-1)  
20 in which they contend that Plaintiff has failed to establish the key elements of sexual harassment  
21 both quid pro quo and hostile work environment. In addition, Defendants argue that Plaintiff's  
22 retaliation claim is time-barred or in the alternative, Plaintiff has failed to establish a causal  
23 connection between any alleged protected activity and the alleged adverse employment action. (See  
24 Docket No. 59 at 2.) Furthermore, regarding Plaintiff's claims under the constitution of the United  
25 States of America, Defendants argue that it fails as a matter of law inasmuch as the complaint is  
26 devoid of any facts that would even hint at a finding of state-sponsored behavior.

27 The court finds that according to the record the following material facts exposed by  
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1 **Civil No. 10-1002 (GAG)**

4

2 Defendants have not been controverted. Plaintiff started working at DDR on June 1, 2007, as  
3 operations manager of three shopping center properties operated and managed by DDR. DDR is  
4 the owner, manager and developer of an international portfolio of shopping centers. It operates and  
5 manages fifteen shopping centers in Puerto Rico. Plaintiff was the operations manager of the Rio  
6 Hondo shopping center (located in Bayamon, Puerto Rico), Plaza Vega Baja (located in Vega Baja,  
7 Puerto Rico) and Rexville Plaza (located in Bayamon, Puerto Rico).

8 Plaintiff stated in his deposition that during his employment at DDR, he reported to Rolando  
9 Albino (“Albino”), regional operations manager for Puerto Rico. Albino in turn, reported to Francis  
10 Xavier Gonzalez (“Gonzalez”), vice-president property management for Puerto Rico. (See Docket  
11 No. 58-3 at 50 L. 25, and at 64 L. 4-12.) Plaintiff testified that Martinez was not above him in the  
12 organizational chart. (See Docket No. 58-3 at 53 L. 5-15.) While working as an operations  
13 manager, Plaintiff’s office was located at the Rio Hondo shopping center in Bayamon, together with  
14 Gonzalez, Albino and Martinez. (See Docket 58-3 at 51 L. 1-7.) Plaintiff’s relationship with  
15 Albino, Martinez and Gonzalez was extremely good while he held the position of operations  
16 manager. (See Docket No. 58-3 at 66 L. 3-7.)

17 Approximately 4 or 5 months after Plaintiff began working for Defendants, a position for  
18 regional general manager became vacant. Plaintiff approached Albino and Martinez regarding his  
19 interest in that position and they, in turn, recommended Plaintiff to Gonzalez. Gonzalez had qualms  
20 about promoting Plaintiff to this position because of his limited experience in managing shopping  
21 centers and because he had not been trained in budget issues and financial reports. (See Docket  
22 No. 58-3 at 56 L. 23-25 and 57 L. 1-3.) However, on November 1, 2007, Plaintiff was promoted to  
23 the position of regional general manager. He was responsible for overseeing the eastern region  
24 properties in the island which were comprised of the following shopping centers: Plaza Palma Real  
25 in Humacao, Plaza Fajardo, Plaza Cayey and Wal-Mart in Guayama. (See Docket No. 58-1 ¶ 16.)

26 Plaintiff stated in his deposition that it was Martinez who trained him in the financial aspects  
27 of his new position and that she was very helpful in the process. (See Docket No. 58-3 at 57 L. 6-9  
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1 **Civil No. 10-1002 (GAG)**

5

2 and L. 19-24.) He also asserted that Martinez showed him how to prepare monthly reports that he  
 3 was supposed to submit. As part of the promotion, his annual salary was increased from \$35,000 to  
 4 \$45,000 and he became eligible to participate in the performance bonus program, like the other  
 5 regional managers. Plaintiff declared that as regional manager, his immediate supervisor was Albino  
 6 and that the only positions that were above his in the operational chart were those of Albino's and  
 7 Gonzalez'. (See Docket No. 58-3 at 64 L. 4-6.)

8       Once Plaintiff was promoted, he was relocated to a new office in Plaza Palma Real in  
 9 Humacao while Martinez, Gonzalez and Albino remained in the central office in Rio Hondo. (See  
 10 Docket No. 58-3 at 67 L. 12-16 and at 68 L. 11-20.) Plaintiff was no longer required to report to the  
 11 Rio Hondo central office on a daily basis. (See Docket No. 58-3 at 75 L. 11-13.) Plaintiff would go  
 12 to the central office if Gonzalez had scheduled a meeting with the regional managers or if he needed  
 13 assistance from Martinez regarding budget planning and financial reporting. (See Docket No. 58-3  
 14 at 75 L. 6-9.)

15       When Plaintiff was promoted to the position of regional management, Gonzalez required him  
 16 to move closer to his new office in Humacao, in the eastern part of Puerto Rico, because he lived  
 17 in the northern part of the island in Toa Baja. Gonzalez stated, under penalty of perjury, that he  
 18 requested Plaintiff to move, because in his experience managers "who have better engagement and  
 19 control over their regions live close to the properties they are managing". (See Docket No. 58-4 at  
 20 ¶ 15.) Gonzalez further stated that when a regional manager lives closer to the region, travel time  
 21 is reduced which allows the manager to arrive earlier and stay later at the region should an emergency  
 22 situation occur. (See Docket No. 58-4 at ¶ 15.) Gonzalez stated that although Plaintiff agreed to  
 23 move when he was promoted, he never did. (See Docket No. 58-4 at ¶ 15.)

24       Gonzalez prepared Plaintiff's performance appraisal for the year 2007. The overall rating of  
 25 his performance appraisal was "meets expectations". Gonzalez discussed this performance evaluation  
 26 with Plaintiff in March, 2008. (See Docket No. 58-3 at 120 and Docket No. 58-4 ¶ 16.) Martinez did  
 27 not evaluate Plaintiff's performance. (See Docket No. 58-3 at 177.) It was González who made the  
 28

1 **Civil No. 10-1002 (GAG)**

6

2 decisions regarding Plaintiff's employment benefits. (See Docket No. 58-3 at 196.) On March 16,  
3 2008, Plaintiff received another increase in his annual salary from \$45,000 to \$60,000. (See Docket  
4 No. 58-4 at 24.) Plaintiff stated at his deposition that he had "high regards" for Gonzalez and that  
5 Gonzalez was a "gentleman". (See Docket No. 58-3 at 295.)

6       In March, 2008, after meeting with Plaintiff for his performance appraisal Gonzalez declared  
7 that he received reports on Plaintiff's tardiness and absenteeism. As a result Gonzalez met with  
8 Plaintiff to discuss these concerns and encouraged Plaintiff to show up at work and to move closer  
9 to his region. (See Docket No. 58-4 ¶ 17.) In June 2008, González found out that Plaintiff had  
10 engaged in a transaction of a financial nature with a contractor and had failed to report it to the  
11 Company. As part of the situation, Martinez and Albino met with the contractor and it was discovered  
12 that the car Plaintiff was driving was under the contractor's company name. The contractor  
13 continued to pay the car and Plaintiff reimbursed him. Gonzalez stated in a sworn statement that this  
14 action constituted a conflict of interest, in violation of Defendants' code of professional conduct and  
15 ethics. (See Docket 58-4 at 4 ¶ 18.) Plaintiff acknowledged receipt of this policy. (See Docket no.  
16 58-3 at 200.)

17       On August 14-15, 2008, a power outage took place at the Plaza Fajardo shopping  
18 center. The outage was caused by the personnel engaged in the construction of a new store in that  
19 shopping center, which left fourteen stores without power for almost thirty consecutive  
20 hours. (See Docket No. 58-3 at 201 and Docket No. 58-7 at ¶ 10.) This incident was considered an  
21 emergency and required special handling as outlined in DDR's Crisis Response Manual. (See Docket  
22 No. 58-6 at 21 ¶ 10.) Plaintiff received a disciplinary warning dated August 16, 2008 for his lack of  
23 diligence in handling the emergency. (See Docket No. 58-7 at 11-12.) Although Plaintiff was asked  
24 to prepare the required Critical Incident Report in relation to the emergency situation, he never did,  
25 nor did he update Albino or González on the outcome of the situation. (See Docket No. 132-3 at 215  
26 L.13-14.)

27       On August 20, 2008 Gonzalez and Albino conducted an independent investigation and met  
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1 **Civil No. 10-1002 (GAG)**

7

2 with Plaintiff's staff at Plaza Palma Real. Plaintiff's staff provided information which revealed that  
 3 Plaintiff continued to breach Defendants' attendance and punctuality policies by regularly arriving  
 4 late or not coming to work at all. (See Docket 58-4 at ¶ 20.) These policies are outlined in DDR's  
 5 Employee Handbook. (See Docket No. 58-7 at 7.) As a result of the meeting with Plaintiff's staff  
 6 and the information obtained regarding Plaintiff's performance, González conferred with Diane  
 7 Kaufman, Director of Employment and Employee Relations, Nan R. Zieleniec, Senior Vice-President  
 8 of Human Resources, and John S. Kokinchak, Executive Vice-President - Property Management, to  
 9 discuss the findings and determine the course of action to follow regarding Plaintiff's employment.  
 10 They all approved Plaintiff's termination based on the information obtained so far, but granted  
 11 González the prerogative to meet with Plaintiff and decide whether to terminate his employment or  
 12 place him on a performance improvement plan. (See Docket No. 58-4 at ¶ 27 and Docket No. 58-8  
 13 at ¶ 4.)

14 On August 25, 2008, González and Albino met with Plaintiff at the Río Hondo  
 15 office. (See Docket No. 58-4 at ¶ 28.) At the meeting, González asked Plaintiff at what time he was  
 16 normally reporting to work and Plaintiff answered that he was reporting every day between 8:30 a.m.  
 17 and 9:30 a.m., in total contradiction to the information previously provided by his staff. (See Docket  
 18 No. 58-4 at ¶ 28.) González terminated Plaintiff at that meeting for giving him false information  
 19 regarding his attendance and punctuality and also due to the questionable business practices brought  
 20 forth by his staff during the investigation, some of which were corroborated by Albino. (See Docket  
 21 No. 58-4 at ¶ 28.) González explained to Plaintiff that he was terminated for his attendance and  
 22 punctuality problems. (See Docket No. 58-3 at 183 L.10-10-13.)

23 Plaintiff filed a discrimination charge before the Equal Employment Opportunity Commission  
 24 on February 26, 2009, alleging sex discrimination and retaliation. (See Docket No. 58-8 at 27.) In  
 25 the charge Plaintiff included a sworn statement where he alleged that Martinez sexually harassed him  
 26 and created a hostile work environment.

27 **III. Discussion**

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1 Civil No. 10-1002 (GAG)

8

2           **A. Title VII Claims**

3           Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating “against any  
 4 individual with respect to his compensation, terms, conditions, or privileges of employment, because  
 5 of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1).  
 6 “Harassment on the basis of sex is a violation of . . . [T]itle VII.<sup>2</sup> Unwelcome sexual advances,  
 7 requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual  
 8 harassment . . . .” 29 C.F.R. § 1604.11 (2010). Sexual harassment constitutes sex discrimination  
 9 prohibited by Title VII. Gorski v. N.H. Dep’t of Corrections, 290 F.3d 466, 472 (1st Cir. 2002).  
 10 There are various types of actionable sexual harassment claims under Title VII: hostile work  
 11 environment claims, *quid pro quo* harassment claims and retaliation claims. See Valentin-Almeyda  
 12 v. Municipality of Aguadilla, 447 F.3d 85, 94 (1st Cir. 2006).

13  
 14           **1. Sexual Harassment Claims**15           **a. Hostile Work Environment**

16           A plaintiff may establish a violation of Title VII by proving that discrimination based on sex  
 17 has created a hostile or abusive work environment. See Forrest v. Brinker Intern. Payroll Co., LP,  
 18 511 F.3d 225, 228 (1st Cir. 2007) (internal citations and quotations omitted). A Title VII hostile work  
 19 environment claim exists where a “workplace is permeated with ‘discriminatory intimidation,  
 20 ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s  
 21 employment and create an abusive working environment.’” Harris v. Forklift Sys., 510 U.S. 17, 21  
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23  
 24           <sup>2</sup> Puerto Rico Law 17 prohibits sexually harassing behavior in employment. It defines it as  
 25 a form of sexual discrimination that constitutes an illegal and undesirable practice. See P.R. Laws  
Ann. tit. 29, § 155. When assessing claims under Law 17, the same exacting standard that is applied  
 26 to Title VII claims is employed in Puerto Rico courts in establishing the existence of a hostile work  
 27 environment. See Sanchez et al. v. A. E. E., 1997 WL 878520 (P.R.); Rodriguez Melendez v.  
Supermercado Amigo, Inc., 1990 WL 657444 (P.R.)

28

Civil No. 10-1002 (GAG)

9

(1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)). In order to state a prima facie case of hostile work environment under Title VII a plaintiff must show the following:

(1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

<sup>11</sup>Forrest, 511 F.3d at 228 (quoting *Crowley v. L.L.Bean, Inc.*, 303 F.3d 387, 395 (1st Cir. 2002)).

9 Defendants contend that Plaintiff fails to establish at least the second, fourth, fifth and sixth elements  
10 of the *prima facie* case. The court examines the above mentioned elements in light of the record<sup>3</sup>

## **Unwelcome Sexual Harassment**

To determine whether conduct is "unwelcome," it is permissible to examine the victim's actions. "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986). Defendants allege that Plaintiff can not establish that he was subjected to unwelcome sexual harassment.

16 Plaintiff admitted at his deposition that his relationship with Martinez, Albino and Gonzalez  
17 was really good while he was operations manager. (See Docket No. 58-3 at 66 L. 3-10.) Plaintiff also  
18 testified that Martinez and him had a relationship in which they would joke with one another and talk  
19 about personal matters. (See Docket No. 58-3 at 180 L. 20-22 and at 230 L. 17-19.) They exchanged  
20 a lot of emails, even after 11:00 p.m., and also talked on the phone a lot. (See Docket No. 58-3 at 177  
21 and at 178 L. 1-2.) Plaintiff admitted in his deposition that there were “double entendre” words in  
22 the emails he sent to Martinez. (See Docket No. 58-3 at 229 L. 11-20 and at 231 L. 3-20.) For  
23 instance, on November 14, 2007, Plaintiff sent an email to Martinez saying: “You know you need  
24 to stay close by and be accessible. If not, what would happen to me?”. (See Docket No. 70-2 at 47.)  
25 On November 27, 2007, Plaintiff sent an email to Martinez saying: “You had me worried. I thought

<sup>3</sup>The court need consider only the cited material, but it may consider other materials in the record. See Fed.R.Civ.P. 56(c)(3); Loc. Rule 56(e).

1 **Civil No. 10-1002 (GAG)**

10

2 you didn't like me anymore!!!!” (See Docket No. 70-2 at 49.) On November 29, 2007, Plaintiff sent  
 3 an email to Martínez stating: “The difference between thermometer and thermostat is, the first  
 4 changes with the temperature that surrounds it and the last changes the temperature that surrounds  
 5 it. Are you thermometer or thermostat?” (See Docket No. 58-5 at 3.) On a string of emails dated  
 6 December 12, 2007, Plaintiff wrote to Martínez: “Come on, no jabs on the genitals allowed” (See  
 7 Docket No. 70-3 at 2.) and “That was right on the nuts!!!!”. (See Docket No. 70-3 at 1.) On  
 8 December 21, 2007, Plaintiff wrote on an email to Martínez the following: “That's because what's  
 9 really needed is a good fuck.” (See Docket No. 70-3 at 6.) On a string of emails dated February 2,  
 10 2008, Plaintiff stated to Martínez: “I love you lots, sweetie.” (See Docket No. 70-3 at 8.) “Treasure  
 11 me, protect me, I will do the same with you.” (See Docket No. 70-3 at 8.)

12 On April 13, 2008, Plaintiff sent an email to Martínez stating: “You know that I  
 13 will not reject anything that you feel it in your heart to give me.” (See Docket No. 70-3 at 13.) On  
 14 April 23, 2008, Plaintiff forwarded a message to Martínez titled: “A Kiss for  
 15 you! (You'll love this) Better than you probably expect.” The message ends up saying: “All you  
 16 gotta do is send this to your favorite buddies. It's adorable so pass it on :-) It's a cute way to make  
 17 a friend smile :-D. You've been Kissed! Muuuuahhhhhh.” (See Docket No. 58-5 at 14-17.)

18 On several occasions, Plaintiff sent Martinez emails where he acknowledged the crucial role  
 19 she had on his career and also thanked Martínez for giving him support. (See Docket No. 58-5 at 21.)  
 20 “Everything you have been sharing with me has been very valuable. All this is becoming a great part  
 21 of my formation in the industry. Keep it up and with God's help, I will never let you or DDR down.”  
 22 (See Docket No. 70-4 at 3.) At one point in his deposition Plaintiff stated that everything he learned  
 23 about the financial aspect of the industry, which in his appreciation is the most important one, came  
 24 directly from Martinez. (See Docket No. 58-3 at 232 L.9-13.)

25 The record shows that Plaintiff and Martinez had the type of relationship where they both  
 26 shared details about their personal lives and most significantly they exchanged emails that were  
 27 sometimes flirtatious, used vulgar language, had sexual content and were not work related. Plaintiff  
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1 Civil No. 10-1002 (GAG)

11

2 did not controvert these facts. As a result, Plaintiff fails to demonstrate that the sexual harassment was  
3 unwelcome.

4 **Harassment was Sufficiently Severe or Pervasive**

5 The First Circuit Court of Appeals has explained that the finding of a hostile work  
6 environment “does not depend on any particular kind of conduct” and “that [t]here is no precise  
7 formula for establishing sufficiently egregious conditions.” Perez Cordero v. Wal-Mart Puerto Rico,  
8 Inc., 656 F.3d 19, 29 (1st Cir.2011). A court must look at the “totality of the circumstances, including  
9 ‘the frequency of the discriminatory conduct; its severity; whether it is physically threatening or  
10 humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s  
11 work performance.’ ” Valentin Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 94 (1st  
12 Cir.2006).

13 The standards for judging hostility are sufficiently demanding “to ensure that Title VII does  
14 not become a ‘general civility code.’ ” Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)  
15 (internal citations and quotations omitted). “[Title VII] forbids only behavior so objectively offensive  
16 as to alter the ‘conditions’ of the victim’s employment.” Oncale v. Sundowner Offshore Services,  
17 Inc., 523 U.S. 75, 81 (1998). “Conduct that is not severe or pervasive enough to create an objectively  
18 hostile or abusive work environment—an environment that a reasonable person would find hostile or  
19 abusive—is beyond Title VII’s purview.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). The  
20 Supreme Court has clarified that “conduct must be extreme to amount to a change in the terms and  
21 conditions of employment.” Id. “[T]he law does not address every discomfort and offense suffered  
22 in the workplace.” Faragher v. City of Boca Raton, 524 U.S. 775, 883 (1998).

23

24 Defendants contend that Plaintiff is unable to establish that the alleged harassment was  
25 sufficiently severe or pervasive. Furthermore, Defendants allege that Plaintiff contradicted himself  
26 more than once during the deposition when asked about the instances in which he was sexually  
27 harassed. Plaintiff stated in his deposition that there were basically two incidents in which he was  
28 sexually harassed by Martinez; one in April, 2008 and one in August, 2008. (See Docket no. 58-3

1 **Civil No. 10-1002 (GAG)**

12

2 at 160 L. 1-2 and at 167 L. 11-20.) Plaintiff also stated that the sexual harassment stopped in two  
 3 different dates; he declared that it had stopped in April, 2008 and he also stated that it stopped in June  
 4 2008. (See Docket No. 58-3 at 181 L. 7-13 14-19.)

5 According to Plaintiff's deposition the first sexual harassment incident took place in April,  
 6 2008 during a managers' meeting in the U.S. Allegedly, Plaintiff had just had dinner at the hotel  
 7 lobby restaurant with a group of managers from the meeting including Martinez. (See Docket No.  
 8 58-3 at L. 5-9.) After dinner, Plaintiff walked up to his hotel room with two women. Plaintiff knew  
 9 one of these women because she had worked with Defendants in P.R., and the other woman was a  
 10 manager from Florida. The woman from Florida entered her room and as he was walking down the  
 11 hallway with the other woman towards her room, Martinez appeared and questioned what they were  
 12 doing together. Next, Martinez started emailing them, telling them to have fun and do whatever they  
 13 want. When Plaintiff returned to his room, Martinez allegedly stood by the door. Plaintiff asked her  
 14 to leave and she left. (See Docket no. 58-3 at 139 L. 6-25 and 140 L. 1-10.)

15 The second hostile environment incident, according to Plaintiff took place in August, 2008,  
 16 a week before Plaintiff was terminated, during a training in the U.S., mainland. (See Docket No. 58-3  
 17 at 167 L. 11-20.) Plaintiff was going up to his hotel room and allegedly Martinez got into the elevator  
 18 with him with the intention of going up to Plaintiff's room. Plaintiff told her not to follow him and  
 19 she desisted. (See Docket No. 58-3 at 167 L.16-19.) Plaintiff stated that at that time Martinez did  
 20 not ask him to have sexual relations with her. (See Docket No. 58-3 at 168 L. 23-25 and at 169 L.  
 21 1.)

22 Defendants contend that these two isolated incidents could be termed as at most  
 23 unprofessional, impertinent or annoying, but they are not sufficiently severe or pervasive so as to alter  
 24 the conditions of Plaintiff's employment. (See Docket No. 59 at 25-26.) The court agrees.

25 The record shows that Plaintiff contradicted himself during his deposition and was vague  
 26 regarding the instances in which he was allegedly harassed. He was never able to answer during the  
 27 deposition the specific occasions when Martinez asked him to have sexual relations with her. Plaintiff  
 28 answered that there were several emails where Martinez asked him to have sexual intercourse;

1      **Civil No. 10-1002 (GAG)**

13

2 however, Plaintiff did not submit any of the alleged emails for the record. In the motion for summary  
 3 judgment Defendants allege that they performed an exhaustive search in Defendants' email server and  
 4 were not able to locate any of the alleged emails. (See Docket No. 58-8 at 33 ¶¶ 5,6.)

5            In addition, Plaintiff and Martinez stopped working at the same office when Plaintiff became  
 6 regional general manager, in November, 2007. As a result, Plaintiff had very little face contact with  
 7 Martinez. (See Docket No. 58-3 at 176 L.13-17.) After November, 2007, Plaintiff's interaction with  
 8 Martinez was on a monthly basis when they had manager meetings and reporting periods, because  
 9 his new office was located in Plaza Palma Real in Humacao and Martínez remained at the central  
 10 offices in Plaza Río Hondo, in Bayamón. (See Docket No. 58-3 at 176 L.19-23.) Furthermore,  
 11 Plaintiff declared at the deposition that the sexual harassment had stopped shortly after the April, 2008  
 12 incident.

13            In sum, Plaintiff and Martinez did not work at the same office in April, 2008, when  
 14 Plaintiff stated in his deposition that the harassment started. In fact, at that point in time Plaintiff and  
 15 Martinez had been working in different offices since he was promoted as regional operations manager  
 16 in November, 2007. If Plaintiff and Martinez were working in different shopping centers in April,  
 17 2008 when, according to Plaintiff, the harassment started, then it is not possible for Martinez to have  
 18 created an objectively abusive work environment at Plaintiff's place of work. During the one or two  
 19 months period that Plaintiff was allegedly sexually harassed there were only two incidents that took  
 20 place in conventions celebrated in the U.S. And according to Plaintiff's deposition the harassment  
 21 stopped shortly after the April, 2008 incident.

22            Based on the totality of the circumstances the court concludes that Plaintiff has failed to  
 23 establish that the alleged harassment was sufficiently severe or pervasive that it altered the conditions  
 24 of his employment nor that the harassment was objectively abusive. Plaintiff did not establish the  
 25 elements of a *prima facie* case of hostile work environment. For this reason, the court **GRANTS**  
 26 Defendants' motion for summary judgment as to the Plaintiff's hostile work environment sexual  
 27 harassment claim.

28            **b.        *Quid Pro Quo* Sexual Harassment**

1 **Civil No. 10-1002 (GAG)**

14

2 *Quid pro quo* sexual harassment also violates Title VII. In this form of harassment, "an  
 3 employee or supervisor uses his or her superior position to extract sexual favors from a subordinate  
 4 employee, and if denied those favors, retaliates by taking action adversely affecting the subordinate's  
 5 employment." Valentin-Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 94 (1st Cir.2006).

6 In order to make a claim for *quid pro quo* sexual harassment, plaintiff must establish: 1) that  
 7 he is a member of a protected class; 2) that he was subject to unwelcome sexual harassment; 3) that  
 8 the harassment was sexually motivated; 4) that his reaction to the supervisor advances affected a  
 9 tangible aspect of his employment; and 5) a basis for employer liability. Crowley v. L.L. Bean, 303  
 10 F.3d 387, 395 (1st Cir. 2002).

11 The court already held that Plaintiff was unable to establish that he was subject to unwelcome  
 12 sexual harassment. In addition, Plaintiff stated in his deposition that Martinez was not above him in  
 13 the organizational chart; and that his supervisors were Albino and Gonzalez. The fact that Martinez  
 14 was not Plaintiff's supervisor remains uncontested. Plaintiff is unable to establish a *prima facie*  
 15 case of *quid pro quo* sexual harassment. For this reason, the court **GRANTS** Defendants' motion for  
 16 summary judgment as to Plaintiff's *quid pro quo* sexual harassment claim.

17 **c. Retaliation**

18 In addition to the hostile work environment claim, Plaintiff claims that he was retaliated  
 19 against after he filed a discrimination charge with the EEOC.

20 Title VII makes it unlawful for an employer to retaliate against a person who complains about  
 21 discriminatory employment practices. See 42 U.S.C. § 2000e-3(a). It has been established in courts  
 22 that "[j]udicial recourse under Title VII [...] is not a remedy of first resort." Morales-Vallellanes v.  
 23 Potter, 339 F.3d 9, 18 (1st Cir. 2003). Therefore, an employee must first timely exhaust  
 24 administrative remedies before presenting his or her Title VII  
 25 claim in federal court. See Franceschi v. U.S. Dept. of Veterans Affairs, 514 F.3d 81, 85 (1st Cir.  
 26 2008). The failure to exhaust the required administrative process, then, "bars the courthouse door."  
 27 Id. at 85 (citing Bonilla v. Muebles J.J. Alvarez, Inc., 194 F.3d 275, 278 (1st Cir. 1999)).

28

1 Civil No. 10-1002 (GAG)

15

2 Even though Puerto Rico is a deferral jurisdiction and a plaintiff can file a charge of  
 3 discrimination with the EEOC within 300 days after the alleged unlawful employment practice  
 4 occurred, the EEOC has not conferred the Antidiscrimination Unit in Puerto Rico with jurisdiction  
 5 to hear claims for retaliation under Title VII. See Rodríguez Velázquez v. Autoridad Metropolitana  
6 de Autobuses, 502 F.Supp.2d 200, 208 (D.P.R. 2007); Alvarez v. Delta Airlines, 319 F. Supp.2d 240,  
7 249 (D.P.R. 2004). “In such a case, claimant will have 180 days, not 300 days, from the alleged  
8 unlawful employment practice to file a charge of retaliation under Title VII with the EEOC”. Id. See  
9 42 U.S.C. § 2000e-5(e)(1).

10 Velázquez was terminated form his employment on August 25, 2008. He filed his  
 11 discrimination and retaliation charge before the EEOC on February  
 12 26, 2009. Therefore, his retaliation claim is time-barred inasmuch as he filed the  
 13 retaliation charge before the EEOC 185 days after the last alleged retaliatory act, that is, his  
 14 termination. As a result, Plaintiff did not timely exhaust remedies and thus is precluded from alleging  
 15 a retaliation claim under Title VII. Accordingly, summary judgment is **GRANTED** on Plaintiff’s  
 16 Title VII retaliation claim.

17           **2. Local Law Claims**

18           Lastly, Defendants request that the court decline to exercise supplemental jurisdiction over  
 19 the state law claims if the federal law claims are dismissed. Plaintiff asserts several causes of action  
 20 under the laws of the Commonwealth of Puerto Rico. Specifically, she alleges claims under Puerto  
 21 Rico Laws 17, 69, 100 and 80.

22           With the dismissal of federal claims against Defendant, there are no pending claims giving  
 23 rise to federal jurisdiction. 12 U.S.C. § 1819(b)(2)(A). As such, dismissal of pending state law  
 24 claims is proper because an independent jurisdictional basis is lacking. Exercising jurisdiction over  
 25 pending state law claims once the federal law claims are no longer present in the lawsuit is  
 26 discretionary. See Newman v. Burgin, 930 F.2d 955, 963 (1st Cir .1991) (holding that “[t]he power  
 27 of a federal court to hear and to determine state-law claims in nondiversity cases depends upon the  
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1 **Civil No. 10-1002 (GAG)**

16

2 presence of at least one ‘substantial’ federal claim in the lawsuit . . . [and] the district court has  
3 considerable authority whether or not to exercise this power, in light of such considerations as judicial  
4 economy, convenience, fairness to litigants, and comity[ ]”).

5 In the instant case, the court chooses not to hear the state law claims brought by Plaintiff  
6 against Defendant with the exception of that under Law 17. This claim is summarily dismissed on  
7 the same grounds as Plaintiff’s Title VII claim. As such, the court will enter judgment **DISMISSING**  
8 **WITHOUT PREJUDICE** Plaintiff’s state law claims against Defendants under Laws 69, 80 and  
9 100.

IV. Conclusion

10 For the foregoing reasons, the court **GRANTS** Defendants’ motion for summary judgment  
11 at docket No.59. As discussed above, Plaintiff’s local claims, with the exception of that under Law  
12 17, are dismissed without prejudice.

13  
14 **SO ORDERED**

15  
16 In San Juan, Puerto Rico this 4th day of September, 2012.  
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S/Gustavo A. Gelpí

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22 GUSTAVO A. GELPÍ

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24 United States District Judge  
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1 Civil No. 10-1002 (GAG)

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